In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 933

ANDREW J. EASTER AND MILDRED P. EASTER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 21-37)[1] are not officially reported. The opinion of the Court of Appeals (Pet. I-II) is reported at 338 F. 2d 968.

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1964. (Pet. 1.) The petition for a

[1] "R." references are to the petitioners' Appendices B-D, pp. 19-37, in their brief in the Court of Appeals.

writ of certiorari was filed on February 26, 1965. This Court has jurisdiction under 28 U.S.C. 1254.

QUESTIONS PRESENTED

Whether the courts below correctly found (1) that taxpayer's cost basis for certain depreciable property did not exceed $28,000, and (2) that the remaining useful lives of certain depreciable properties were greater than claimed by the taxpayer.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 167, 1011, 1012, and 1016 of the Internal Revenue Code of 1954 appear in the Appendix, *infra*, pp. 8-9.

STATEMENT

Andrew J. (hereinafter called the taxpayer) and Mildred P. Easter filed a joint income tax return for the taxable year 1958 in which, as in prior years, they claimed depreciation deductions on four pieces of improved realty. The Commissioner made adjustments in connection therewith and determined an income tax deficiency (R. 24-25, 26-27). In the Tax Court further adjustments were made (R. 27-37) and the Court of Appeals affirmed the Tax Court (Pet. I-II).

1. Certain unimproved property at 6608 Belair Road, Baltimore, Maryland, was acquired by the taxpayer in 1940 from his mother's estate. Pursuant to

a lease agreement executed in 1948 with Honey Lane, Inc., a portion of this property was developed into a drive-in restaurant and a barbecue house. Honey Lane, the tenant, paid over $50,000 for improvements; of this amount $20,000 was borrowed on the security of a mortgage on the taxpayer's property. In 1949, Honey Lane went into receivership and the taxpayer took over the premises after paying the $20,000 mortgage plus $8,000 interest, or a total of $28,000 (R. 22-24).

In his tax returns for years prior to 1958, the taxpayer claimed and was allowed depreciation deductions on the property improvements based on a cost of $75,000 (R. 24-25). In his 1958 tax return, the taxpayer claimed depreciation on the improvements based on the same cost. In a notice of deficiency, the Commissioner reduced the depreciation allowance, in part on the ground that its cost or other basis to the taxpayer was $45,000 (R. 25). In the Tax Court the Commissioner took the position that the cost of the property improvements to the taxpayer was not in excess of $28,000 and that the taxpayer, having previously taken depreciation on the property in excess of that amount, was not entitled to any depreciation on the property in 1958 (R. 28). The Tax Court so held (R. 28-30) after finding as a fact that the cost of the improvements did not exceed $28,000 (R. 25).

2. The three remaining properties, as to which only the useful life has been in dispute (R. 30), are (1) an apartment (No. 104) in a cooperative apartment building located at 2801 Adams Mill Road, Washington, D. C.; (2) a brick building located at

6420 Belair Road, Baltimore, Maryland; and (3) a frame house at 6502 Belair Road, Baltimore, Maryland.

In his returns for years prior to 1958, the taxpayer claimed depreciation deductions on these properties on the basis of certain cost bases and estimated useful lives and the deductions were allowed as claimed. (R. 26.) In his 1958 return, the taxpayer claimed deductions for the three properties based upon the same costs and estimated useful lives used in the prior returns, showing the remaining useful lives of the properties to be 8 years, 2 years, and 2 years, respectively. In a deficiency notice, the Commissioner accepted the cost bases claimed by the taxpayer but determined that the estimated useful lives and remaining useful lives of the properties were greater than claimed by the taxpayer (see R. 26).

The estimated useful lives and remaining useful lives determined by the Commissioner were changed by the Tax Court. As to the apartment at 2801 Adams Mill Road, the Tax Court concluded (R. 33) that the estimated useful life was 37 years when acquired by the taxpayer in 1946 and that its remaining useful life on January 1, 1958, was 25 years. As to the brick building located at 6420 Belair Road, Baltimore, Maryland, the Tax Court concluded (R. 34) that the estimated useful life of the property in 1924, when built by the taxpayer, was 31 years and that its remaining useful life as of January 1, 1958, was 16 years. Since there was no evidence whatever as to the remaining building at 6502 Belair Road, Baltimore, Maryland, the Tax Court upheld the Com-

missioner's determination (R. 27) that it had an estimated useful life of 40 years and a remaining useful life of 22 years (R. 34-35).

ARGUMENT

The decision is correct and there is no conflict among the circuits. There is no occasion for further review of the factual findings concurred in by both courts below. See *Comstock* v. *Group of Investors*, 335 U.S. 211, 214 (1948).

1. In view of the purpose of the depreciation deduction to allow recovery of a taxpayer's cost of an exhausting asset—it is elementary that a taxpayer cannot, through depreciation, recoup an investment in a depreciable asset made by a stranger. *Detroit Edison Co.* v. *Commissioner*, 319 U.S. 98 102 (1943); *Commissioner* v. *Revere Land Co.*, 169 F. 2d 469 (C.A. 3d), certiorari denied, 335 U.S. 853 (1948); *Commissioner* v. *Arundel-Brooks Concrete Corp.*, 152 F. 2d 225 (C.A. 4th, 1945). The Tax Court found as a fact (R. 25) that the cost to the taxpayer of the improvements at 6608 Belair Road did not exceed $28,000. There is no evidence to the contrary. It follows that, since the taxpayer had already been allowed depreciation deductions on the property in excess of that amount, he was not entitled to a depreciation deduction on the property in 1958. Internal Revenue Code of 1954, Sections 167(g) and 1016(a)(2).

2. The taxpayer's position regarding the other three properties is equally lacking in merit. The taxpayer presented very little evidence as to their useful life. He testified himself but did not state his opinion

as to the useful lives of the properties at any given time and did not testify as to the physical condition of the properties or other factors which would be relevant and helpful in determining useful life. (R. 32.) The Tax Court's findings regarding the useful life of the two properties as to which it made findings (the cooperative apartment and the brick building at 6420 Belair Road) were therefore necessarily based on the testimony of a real estate appraiser employed by the Internal Revenue Service. The record shows conclusively that there was ample factual support for the appraiser's testimony (R. 32-34).

As to the third property (the frame house at 6502 Belair Road), which the appraiser was unable to locate, there was no evidence except that of the taxpayer that the building was in existence in 1958, that in 1963 it was 150 years old, that it was a frame house which he had purchased from his mother's estate in 1940, and that it was used as a two-apartment family house. (R. 34.) Since the taxpayer had the burden of proving the Commissioner's determination wrong (*Welch* v. *Helvering*, 290 U.S. 111 (1933)) and there was no evidence concerning the condition of the building or other evidence upon which the Tax Court could make a finding (R. 34), the Tax Court, had no alternative but to approve the Commissioner's determination as to useful life.

3. The taxpayer's real complaint seems to be that the Commissioner's deficiency determination was based on a depreciation base as to one property (at 6608 Belair Road) and useful lives as to the other properties which were different from those which the

Commissioner had accepted for prior years. This estoppel argument was properly rejected by both courts below. The Commissioner's failure to object to prior returns and claims does not support an estoppel. *Casey* v. *Commissioner*, 38 T.C. 357, 381 (1962); *Caldwell* v. *Commissioner*, 202 F. 2d 112, 115 (C.A. 2d, 1953). Each taxable year is a separate unit for depreciation purposes. *Virginian Hotel Co.* v. *Helvering*, 319 U.S. 523, rehearing denied, 320 U.S. 810 (1943). Accordingly, depreciation deductions may be considered in any year it is apparent that useful life is erroneous. *Wier Long Leaf Lumber Co.* v. *Commissioner*, 9 T.C. 990 (1947), reversed on another point, 173 F. 2d 549 (C.A. 5th, 1949).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

MELVA M. GRANEY,
LUCY R. THORNTON,
Attorneys.

APRIL, 1965.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

* * * *

SEC. 167. DEPRECIATION.

(a) *General Rule.*—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

* * * *

(g) *Basis for Depreciation.*—The basis on which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 1011 for the purpose of determining the gain on the sale or other disposition of such property.

* * * *

SEC. 1011. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis (determined under section 1012 * * *) adjusted as provided in section 1016.

SEC. 1012. BASIS OF PROPERTY—COST.

The basis of property shall be the cost of such property, except as otherwise provided in this subchapter * * *.

* * * *

SEC. 1016. ADJUSTMENTS TO BASIS.

(a) *General Rule.*—Proper adjustment in respect of the property shall in all cases be made—

* * * *

(2) in respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent of the amount—

(A) allowed as deductions in computing taxable income under this subtitle or prior income tax laws, and

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